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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-264
	)	
Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-trafficking Provisions	)	

To: The Commission

COMMENTS OF INTERNATIONAL FAMILY ENTERTAINMENT, INC.

International Family Entertainment, Inc. ("IFE"), in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the captioned proceeding (released December 28, 1992) hereby files comments concerning rules to be promulgated by the Commission to prescribe "reasonable channel occupancy limits" for vertically integrated video programmers, pursuant to section 11 of the Cable Television Consumer Protection and Competition Act of 1992 (the "Cable Act"). The Commission's rules should encourage necessary investment by cable companies in existing and new cable networks, while still protecting consumers from the perceived harm that might result from cable operators' ability to favor without business justification certain programmers which they control.

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List A B C D E

A. IFE's Interest in this Proceeding

1. IFE owns and operates the Family Channel, a 24-hour per day cable television network that is primarily distributed through cable television systems throughout the United States. The Family Channel provides family-oriented entertainment, including original made-for-television movies, dramatic and comedy series, inspirational programs and children's programming.

2. The Family Channel is a leader among basic cable networks in the development of original programming. Since September 1988, it has developed, through co-production arrangements, approximately $245 million of original programming for the network, at a cost to IFE of approximately $91 million. As part of its effort to increase the variety of programs available to consumers, IFE has also publicly announced plans to launch a new cable program network, The Game Channel.

3. In order to meet its continuing commitment to produce original programs, IFE has needed to raise substantial amounts of capital from outside sources. IFE's experience has been that cable system operators have been among those most willing to make the necessary investments in new programming ventures. It is vitally important that cable system operators be able to continue to make these investments. Otherwise, it will not be feasible for networks such as the Family Channel to continue to produce high-quality original programming.

4. The Commission's regulations implementing the Act must therefore not work to hinder cable company investments by denying programmers access to cable systems which make those investments.

Consumers will suffer if a cable operator is precluded from making a free market decision to carry a new cable network merely because that operator has chosen to make an investment in that network. IFE's comments seek to help the Commission fashion rules that will avoid this sort of result -- which is contrary both to Congressional intent and to the public interest -- while still serving to protect consumers from damage that could result from a cable operator's unjustifiable favoritism of a programmer that it controls.

B. The Rules Should Apply Only to Cable Operators Found to Have Discriminated Against Unaffiliated Programmers

5. The serious antitrust injury to consumers which should be the Commission's concern under the Act can occur only when vertically integrated cable operators discriminate against programmers they do not control through unjustifiable discriminatory prices, channel positionings and promotions. Thus, the Commission's rules limiting the number of channels occupied by vertically integrated programmers should focus on discriminatory operators, and should not tamper with the marketplace decisions of operators who do not discriminate. See Cable Act §2(b)(2) ("it is the policy of the Congress...to rely on the marketplace to the maximum extent feasible, to achieve...availability to the public of a diversity of views and information.") Because of the enormous benefit of cable operator investment in programmers -- described in paragraphs 44 and 45 of the NPRM and confirmed by IFE's experience -- it would be totally

wrongheaded to impose restrictions on non-discriminating operators' ability to select the optimal mix of programming for their subscribers merely because they have chosen to invest in certain program vendors. Indeed, such restrictions would hurt consumers and would serve only as protectionist rules to favor the business interests of certain programmers at the expense of others.

6. It is important to note that to the extent section 11 of the Cable Act imposes structures on vertically integrated entities beyond those imposed by generally applicable antitrust laws, that extra burden is an unconstitutional targeting of a protected medium of expression. See e.g., Minneapolis Star & Tribune Co. v. Minnesota Comm. of Revenue, 460 U.S. 575 (1983) (government cannot target media with a tax that is not generally applicable). Because of this central First Amendment concern, the Commission's regulations should not -- indeed cannot -- interfere with the free market programming choices of cable operators who do not cause antitrust injury to their subscribers by discriminating against certain programmers.

C. The Rules Should Require A Complaint By An Aggrieved Programmer

7. The Commission's rules should impose channel occupancy limits on program networks by the owner of a specific cable operator only if a rival non-integrated cable network complains that it is being denied access as a result of that owner's programming decisions. In the absence of such a complaint, it

would hurt consumers to impose a limitation on the number of vertically integrated programmers that a system can carry.

8. It would surely be the height of folly to preclude a system from carrying a new cable network in which it had made an investment if there were no other cable network complaining that it wanted access. The lack of a complaint is the best evidence that there is no viable alternative to the network selected; and consumers would certainly be worse off if they had no programming to watch than if a cable operator were allowed to exercise its marketplace choice to make available a new cable network which it controlled.

D. Cable Operators Should Be Permitted to Show Legitimate Business Reasons for Choosing An Affiliated Station

9. In order to insure further that its regulations benefit consumers -- and are not merely protectionist measures for certain businesses -- cable operators should be able to rebut any regulatory channel limitation by showing legitimate business reasons for offering stations it controls as part of its programming mix. For example, if a cable operator chooses to offer a cartoon channel that it owns rather than a news channel in which it has no interest, the operator should be allowed to show that consumers prefer more cartoons or that there are alternative news sources available. Such proof could take the form of marketing studies, polls of subscribers, or other analysis.

10. IFE makes this proposal because it would be contrary to Congressional intent and to sound policy if the Commission's rules were to thwart consumer preferences merely in order to assist certain cable channels at the expense of others. IFE, which is dedicated to the production of high-quality programs for cable viewers, strongly urges that the focus of the Commission's regulations remain on the viewers.

E. Any Channel Limitations Should Not Be Retroactive

11. IFE urges the Commission to maintain its tentative conclusion that any channel limitations should not be applied retroactively against existing contracts between program producer vendors and multichannel video distributors. (NPRM ¶ 55). Programmers have relied on the terms of their existing contracts with cable operators in making investments in new and existing series. These investments are in many cases long-term. If the Commission's channel limitations were to be retroactive, it could jeopardize programmers' plans and investments for the future. Any retroactive effect could have serious adverse effects on program suppliers, thereby harming the intended beneficiaries of the Act -- the consumers.

12. Moreover, as the Commission states, mandatory divestiture or deletion of cable channels in connection with new regulatory requirements would result in unnecessary and traumatic disruption of service to the public. The effects on both cable programmers and the public are potentially catastrophic.

F. The Rules Should Limit Carriage Only of Stations That An Operator Controls

13. The Commission should adopt a rule that only puts limits on those programmers that a particular cable operator actually controls. (See NPRM ¶46). In determining whether an operator has control, the Commission should use the indicia which is has traditionally used for the broadcast industry. See e.g., CBS Management Changes (Transfer of Control Allegations), 61 RR 2d 413 (1986). By using this standard, the Commission will limit cable operators' marketplace choices only in connection with those programmers whose policies they control and direct, where discrimination can be a problem, without chilling programmers' willingness to accept necessary substantial investments from cable operators.

14. IFE believes that it would gravely imperil necessary cable industry investment in cable programmers if the channel limitations were placed on stations based on the five-percent level used for attribution of ownership in the broadcast industry, or even at the ten-percent level currently being considered for that industry. The broadcast threshold is designed to implement radically different policies and should therefore not be used in connection with the Act's attempt to protect anticompetitive harm to cable viewers.

15. The Commission's attribution rules in the broadcast industry are the result of an effort, beginning in the 1940's, to limit the multiple ownership of broadcast facilities so as "to promote diversification of ownership in order to maximize

diversification of program and service viewpoints as well as to prevent undue concentration of economic power contrary to the public interest." Multiple Ownership Rules, 55 RR2d 1465 (1984), quoting Amendment of Multiple Ownership Rules (Docket No. 8967), 18 FCC 288, 291-92 (1953). It was in order to ensure this "diversification of ownership" that the Commission adopted the rule that a five-percent holding would be an attributable ownership interest. Id. By contrast, Congress has recognized -- and IFE's experience confirms -- that cable operators should be encouraged to invest in various programmers in order to help finance innovative programs. (See NPRM ¶¶44-45). The Act's proscriptions on "vertically integrated" cable programmers are designed instead to protect consumers from harm that may result from anticompetitive practices. The highly restrictive broadcast attribution rules are inappropriate for facilitating this totally different goal, and would have the effect of stifling vital investments in new and innovative programs.1/

16. Under IFE's proposed rule, the Commission will not restrict the access to cable systems of a cable programmer merely because a cable operator has determined to make a sizable investment in that programmer. Thus, cable programmers will not

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1/ If the Commission imposes a threshold lower than control in imposing restrictions on the number of existing cable channels, it should certainly adopt a higher threshold for new cable channels. (See NPRM ¶46). It is crucial that the cable operators be allowed to invest in new networks if those networks are to succeed in offering new program options to consumers. The Commission's regulations should therefore not stop cable company investments by mandating that an operator cannot carry a new channel if it invests in it.

be deterred from accepting investments that will allow for production of the innovative program that consumers want and deserve. Moreover, as Congress intended, the Commission will be relying to the maximum extent feasible on the marketplace. (NPRM ¶12, citing section 2(b)(2) of the Act).

G. The Channel Occupancy Limits Should Be Calculated As A Percentage of All Non-Pay Channels

17. In response to the Commission's query in paragraph 48 of the NPRM, IFE believes that any channel occupancy limit should be calculated as an allowable percentage of all non-pay channels. As the NPRM states, over-the-air broadcast channels, public broadcasting channels, and leased non-pay channels are all competitive with cable programming and provide alternatives to stations controlled by a cable operator. Moreover, the new must-carry rules will already insure that alternatives will be available; and signals carried pursuant to those rules should therefore be counted as part of a system's capacity.

18. IFE does not believe, however, that pay channels should be counted as part of cable systems' capacities. As the NPRM notes, not all subscribers receive these channels. Because the channels can be viewed only by those who choose them and pay for them separately, the pay networks should not count as part of the total programming made available by an operator.

H. Channel Limits Should Apply Only to Video Programmers Controlled By the Particular Cable Operator

19. IFE strongly supports the Commission's view, stated in paragraph 50 of the NPRM that it would be neither reasonable nor consistent with Congressional intent to create limits on the number of vertically integrated programmers which can be carried by any cable system, regardless of whether a particular operator is affiliated with the programmer in question. Instead, the limitations should apply only to the number of channels which a particular cable operator can devote to programmers who are affiliated with that cable operator. As the Commission states, only this more reasonable restriction is even arguably necessary to protect consumer welfare.

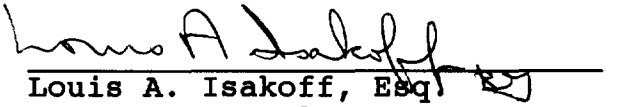
I. Channel Limits Should Be Phased Out Where Systems Face Competition or Exceed A Specified Number of Channels

20. IFE supports the Commission's tentative conclusions that channel limitations should be phased out where (a) a cable system's channel capacity exceeds a specified number of channels; and (b) in communities where there is competition. (NPRM ¶54). In either case, the incentive for an operator to discriminate against non-affiliated programmers will disappear and consumers will have access to any programming service for which there is any substantial demand. Thus, there will be no justification whatsoever for any interference with the marketplace.

21. IFE believes that the standard for finding that there is "competition" for purposes of the channel limitation should differ from the "effective competition" rules and should state that there is "competition" on the basis of a lower penetration threshold by an alternative multichannel video distributor. An alternative cable system can provide an outlet for programming services, and thus remove any need for channel limits, even if that system does not meet the penetration threshold necessary to ensure the control of price that Congress has found results from "effective competition".

CONCLUSION

The Commission's rules should not discourage cable company investments in programmers: those investments are necessary for the production of innovative products. Moreover, the Commission should focus at all times on real harms to the consumer -- the viewing public -- which can be caused by vertical integration, and should ensure that its rules do not result in a windfall to certain programmers at the expense of others, but rather in increased alternatives for the intended beneficiaries, the subscribers.



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CERTIFICATE OF SERVICE

I, Louis A. Isakoff, hereby certify that I have this 9th day of February, 1993, caused to be hand delivered copies of the foregoing "COMMENTS OF INTERNATIONAL FAMILY ENTERTAINMENT, INC." to the following:

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